Remarks of Commissioner Linda K. Breathitt
Federal Energy Regulatory Commission

"Utility & Telecom Mergers and Acquisitions in a Global Economy: Is There a Need for New Interagency Cooperation?"

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Good morning! I am delighted to be with you today in this beautiful "holiday wonderland" Williamsburg becomes in December. The Colonial atmosphere as a setting for this conference makes for a wonderful juxtaposition of yesterday and tomorrow. I can't think of a topic more on the "cutting edge" than utility-telecom mergers, and so and I look forward to exchanging our perspectives on the impact of convergence on our respective agencies' review of mergers.

In the United States and internationally, increasingly more natural gas and electric company executives are adding telecommunications to their array of services. And they are finding that Wall Street places a higher value on such diversified energy-telecom companies. This builds upon the phenomenal natural gas-electric consolidation that has taken place over the past few years. I call the convergence phenomenon a "revolution" because I think this term best reflects the profound changes that all sectors of society are experiencing as a result of recent utility-telecom activity.

I think it is fair to say that regulators assumed a pivotal role in creating a new regulatory environment, which in turn, is allowing convergence industries to flourish. To put it simply, regulators have promoted competition in the utility and telecom industries, and this increased competition has engendered convergence. FERC's primary contributions to the convergence revolution were the requirements of open-access, nondiscriminatory, natural gas transportation, and the unbundling of sales and transportation. Several years later, FERC followed suit with electric transmission.

Of course, I cannot say that the intended objective of either of these initiatives was specifically to encourage the interplay among markets that previously had been distinct. The goal was to increase competition in traditionally tightly regulated, monopolistic markets, so that we could allow markets to work with less direct intervention from regulators. The ultimate regulatory goal is for consumers to realize the benefits of competition.

Restructuring is now a reality in many states as well as at the federal level. Not surprisingly, the new environment created by competition in regulated industries has had a cataclysmic effect on traditional regulatory roles and responsibilities. Over the past few years, the regulatory focus has shifted away from tight market controls to the innovation of market-oriented solutions to regulatory problems. Federal and state regulators are trying to adopt a lighter-handed approach where consumer protection can be addressed through other means. We have not yet achieved fully competitive utility markets. But the increased competition that has emerged from gas and electric restructuring has set the stage for energy-telecom convergence.

FERC's efforts, of course, have been limited to its jurisdictional natural gas and electric markets. But while FERC is not engaged in the direct regulation of telecommunications activities, the increasing integration among the energy and telecom industries does affect our regulatory programs - and in turn, our regulation affects telecom industries. Most notably, the hallmark of FERC's transition to lighter-handed regulation is the need for market transparency as an effective deterrent against market power abuse. A natural outgrowth of this "regulation by information" strategy is a need for standardized business practices and communications protocols. This need has definite implications for IT service providers as pipelines and utilities seek ways to implement FERC's information-based regulatory initiatives in a cost-effective and efficient manner. In addition, the industries FERC regulates are turning toward eCommerce to enhance the efficiency of trading - and FERC must ensure that consumers are protected in the trading of jurisdictional services.

But even more relevant to the theme of this conference, the increased integration of gas and electric markets is also reflected in mergers between power generators and pipeline companies, as well as in the number of marketers that resell both gas and electricity. The "merger mania" that is occurring among energy companies is bound to keep regulators busy looking at market power issues associated with these mergers.

I have been asked to give my views today on the need for both informal and formal interagency cooperation as network companies, through mergers, take on greater multi-jurisdictional and cross-regional market activities. While the spirit of cooperation is certainly attractive and easy to embrace, I must point out that there are several paramount considerations that make interagency cooperation on specific cases a very complicated proposition, indeed. Certainly informal cooperation, on generic issues, among FERC and other federal agencies -- such as the Federal Trade Commission, the Department of Justice and the Department of Energy -- occurs. Interagency staff conferences allow for discussion and debate of current, non case-specific market issues and trends. There are other ways in which agencies can share ideas on generic issues, such as in formal written comments to rulemaking proceedings and through attendance at conferences such as this one.

Case-specific cooperation among federal agencies, however, is complicated by several factors. First, all merger reviews are not created equal. For example, FERC's Federal Power Act "public interest" standard is different from the "no harm to competition" antitrust standard of the Sherman Act and the Clayton Act. In addition, while FERC's merger review is designed to rely on applicants to conduct and file their own market power analyses, other agencies engage in an entirely different process. The relevant information required for the type of review conducted by a regulatory agency, then, would not likely be the same information required by an agency conducting antitrust review of the same merger. While the same merger may be reviewed by various agencies, the analyses are not necessarily parallel; standards and requirements vary from agency to agency.

Second, and perhaps more importantly, regulatory agencies and antitrust agencies operate under different standards of confidentiality. The record underlying FERC's decisions is public, and only under very specific circumstances do FERC's regulations allow nondisclosure of company submissions. On the other end of the spectrum, DOJ's discovery is non-public and is not disclosed. Further, we all operate under different ex parte standards. In merger proceedings before FERC, other agencies can, and often do, intervene; but their status is the same as other intervenors, and the ex parte rules apply equally to all parties. That means that FERC's communications with other agencies with respect to pending cases is strictly controlled.

The bottom line, then, is that interagency cooperation in specific cases is limited by the application of different standards of review, as well as by the operation of varied confidentiality and ex parte standards. That is not to say, however, that agencies can never be influenced by the actions of another agency on the same merger. Merger applicants and the attorneys representing them have become very savvy in gauging when agencies are likely to act on their applications. When the order of the rulings can be anticipated, there is a certain strategy in the timing of the applications.

The future of merger review is difficult to predict; but we at FERC have been devoting a great amount of effort in ensuring that we have in place procedures that are sufficiently flexible to withstand the needs of a rapidly changing marketplace. Just last month, FERC issued a new final rule governing merger applications that reflects an evolutionary approach that we believe will be suited to increasingly competitive markets. The final rule was informed by comments filed by numerous industry stakeholders, including federal and state agencies with merger review authority.

Prior to the issuance of the new rule, FERC analyzed merger applications on a case-by-case basis, under the broad policies articulated in a 1996 policy statement. The new rule was designed to update and organize our merger filing requirements, and therefore expedite the processing of applications. But more importantly, it also provides a framework for the resolution of new issues that may arise as a result of competition and industry consolidation.

The new rule sets forth specific guidelines and filing requirements for mergers that may raise horizontal competitive concerns, as well as for mergers that may raise vertical market power concerns. I believe that the establishment of such guidelines and requirements is especially important at this time of emerging competition and increased industry consolidation. As the utility industry becomes ever more complex, I believe FERC's public interest protection mandate requires that we have efficient, yet sufficient merger filing requirements in place - and in my estimation, our new rule accomplishes those goals.

Another major aspect of the new merger rule is the acknowledgment of a set of emerging issues occurring in the industry that could affect mergers and FERC's review of merger applications. These include technical issues, such as the potential for computer-based simulation models. There are many issues to be addressed in this regard, and the Rule establishes a technical conference for the purpose of exploring computer modeling.

Other emerging issues acknowledged in the Rule pertain to the ever-changing nature of the electric industry – such as retail competition and restructuring. Over the past few years, FERC has evaluated various types of mergers of interconnected, adjacent, vertically-integrated companies. Others involved utilities that were geographically separated and not physically interconnected. Yet others involved mergers of electric companies with natural gas companies and acquisitions of jurisdictional utilities by foreign firms. Therefore, during our rulemaking process, we decided to seek public comment on new kinds of mergers that may lead to the blurring of traditional utility services and other business lines. We asked whether we should expect new types of corporate transactions involving public utilities to emerge, what form they might take, and how we should analyze the competitive effects of such combinations. The rule acknowledges that there may be instances in which the Commission may require information beyond that specifically required under the rule in order to evaluate the effects of a proposed merger.

Another of the emerging issues which we touched upon in our new rulemaking is also relevant to today's discussion; and that is the effect of a proposed merger's impact on retail markets. While FERC does not have jurisdiction over retail markets, recent developments in some markets have demonstrated the relationship between conditions in retail markets and wholesale market prices. Some state authorities filed comment encouraging FERC to extend our analysis in all merger cases to include retail markets, on the grounds that changes in the industry are blurring the lines between wholesale and retail markets. We clarified that FERC stands ready to evaluate a proposed merger's impact on retail competition if a state lacks adequate authority to consider such matters, and requests us to do so. But it is FERC's continuing position that our merger review should not, as a matter of course, review a merger's impact on retail markets in that state when the state itself is clearly able to do so.

Do I think FERC's final rule contains all the answers to merger review in increasingly competitive and converged markets? Certainly not. But by acknowledging these important issues, I believe we transform our merger review process into a dynamic and flexible process - one that is required in today's market.

And what of a need for new interagency cooperation? At the present time, I do not foresee agencies pooling resources to review case-specific mergers. For the time being, I believe agencies will continue to process mergers according to their own standards, and pursuant to their own requirements. But as regulated markets converge, and as convergence markets cross state and international boundaries, new jurisdictional questions are bound to arise.   For example, how might remedies applied by one agency affect the jurisdiction of another agency? Such questions, for now, remain unanswered. But I would like to emphasize that a willingness among agencies to work together can go a long way in addressing new issues arising from mergers that cut across utility sectors, as can flexible approaches to merger problems.